TESTIMONY OF ALEX SKIBINE BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS FOR THE OVERSIGHT HEARING ON THE IMPLEMENTATION OF THE ALABAMA-COUSHATTA RESTORATION ACT

Mr. Chairman, members of the Committee, thank you for scheduling this hearing and allowing me to testify on this important matter. Although I am currently a professor of law at the University of Utah and have been so for the last 12 years, I was deputy counsel for Indian Affairs for the House Interior Committee from 1981to 1989. As such, I was the counsel assigned with the primary responsibility of overseeing passage on the House side of the bill restoring federal recognition to the Ysleta Del Sur Pueblo and the Alabama & Coushatta Tribes of Texas (hereinafter, the Texas legislation). Set forth below are my thoughts and recollection about what Congress did at the time the legislation was passed as well as my analysis of the subsequent court decisions.

1. Chairman Udall's role and my own interpretation.

An important and controversial part of the legislation recognizing the tribe were the sections dealing with gaming on the reservation. The original bill as passed by the House in the 99th Congress provided that gaming on the reservation shall be conducted pursuant to tribal gaming laws which shall be identical to the gaming laws of the state of Texas. However there was an important caveat: such gaming laws could be amended by the tribe if the changes were approved by the Secretary of the Interior and upon such approval, submitted to Congress which was to have 60 days to disapprove such amendments by enactment of a joint resolution.

That bill was referred to the Senate Select Committee on Indian Affairs which made further amendments to the bill to satisfy the concerns the state of Texas had expressed about the House passed version. These amendments in effect stated bluntly that gaming as defined by the laws of Texas was hereby prohibited on the tribe's reservation. Action on the Senate bill, however was vitiated by the Senate and as a result, the Texas legislation died in the 99th Congress.

I clearly remember how disappointed I was when the Senate first amended H.R. 1344, the bill I had worked on in the House. I was also disappointed when Congressman Coleman in the following Congress, the 100th Congress, decided to introduce a new bill, H.R. 318, which adopted the language passed but not enacted by the Senate in its previous session. This time, no hearings were held on that legislation but it was favorably reported by the House on March 11, 1987 and passed under suspension of the rules on April 21st.

During the period the bill was pending in the House, one major event happened: the Supreme Court handed down its landmark decision in Cabazon v. California on February 25, 1987. This decision denied the state of California any jurisdiction over Indian gaming and therefore was considered a major victory for tribal gaming interests. However, the favorable decision also made it virtually certain that the Congress was going to proceed with the enactment of a comprehensive Indian gaming

legislation. It is with that understanding that the Texas recognition bill was taken up one more time by the Senate Indian Affairs Committee. This time, the bill was reported out of the Indian Affairs Committee with an amendment in the nature of a substitute. The bill passed the Senate on July 23rd and the House concurred with the Senate amendments on August 18th 1987.

I remember how relieved I was upon being informed that the Senate had amended the House passed bill. I interpreted the change to be a meaningful one. One which would allow the tribe to enter into any form of gaming not prohibited by the laws of Texas. The change was meaningful because the previous version would have prohibited on the reservations any form of gaming as defined by the laws of Texas even if Texas allowed some forms of gaming outside the reservations.

I told Chairman Udall about my understanding and because he agreed with me, he decided to include that interpretation as part of his final remarks on the floor of the House. More importantly, Chairman Udall is not the only person who had to agree with this interpretation. That language had to be cleared by the minority, by Congressman Coleman, by the official Republican objectors on the floor which meant that the Reagan Administration also had to give it its blessing, and finally by Congressman Vento who had been appointed by Chairman Udall to go to the floor of the House for the purpose of asking the House for unanimous consent to agree to the Senate amendments and send the bill to the President. To ascribe this statement as the last minute opinion of a minor congressman, as stated by the court is ludicrous and show a complete ignorance (or disregard) about how business is conducted by the House of Representatives. .

2. The meaning of section 107: Plain meaning vs legislative history.

The legislation finally enacted by the Senate moved away from prohibiting all "gaming" as defined by the laws of Texas to only forbidding games "prohibited by the laws of the State of Texas." Although the plain meaning of the crucial sentence is clear and is almost identical to the language used by the Supreme Court in Cabazon, if there are any ambiguities, it comes from the last sentence of Section 107 which mentions that the provision of this subsection are enacted in accordance with the tribal resolution of March 12, 1986. The problem comes from the fact that the tribal resolution purports to endorse a complete ban on all gaming on the reservation. Furthermore, the Senate Report contains language asserting that "the central purpose of the bill was still to ban gaming on the reservations as a matter of federal law."

So what we have here is an ambiguity. Yet, the Fifth Circuit Court of Appeals in litigation involving the Ysleta Del Sur Pueblo but based on the same language decided to ignore the changes made by the Senate. In fact the court decided to pretend that the Senate had just approved the same bill passed earlier that year by the House. With all due respect, Mr. Chairman, this takes judicial activism to a whole other level.

The change made by the Senate cannot be ignored or considered meaningless. While the

reference to the Tribal resolution makes the sentence ambiguous, it cannot just be coincidental that the language used ended up being almost identical to the Court's reasoning in Cabazon and what eventually would become IGRA. It seems to me that the Senate realized that it was eventually going to enact a comprehensive gaming bill partly codifying Cabazon and attempted to make the Texas Bill conform to what such a bill would eventually look like.

While the Fifth Circuit decided to focus on extraneous materials such as the Senate report to support its conclusion that gaming was still prohibited under the final version of the bill, it decided to totally dismiss other extraneous materials such as the fact that the *Cabazon* decision came down while the Texas legislation was being considered by the Congress, and more importantly from my perspective, Chairman Udall's own words to the effect that the bill as finally enacted was a codification of the civil/regulatory, criminal/ prohibitory test endorsed by the Supreme Court in *Cabazon*.

I do not know why exactly the Senate left the language relative to the tribal resolution. If I had to make an educated guess, I think it was just a drafting mistake. Staff just forgot to take the language out. Such mistakes happen. In last year's decision in *Chickasaw Nation v. United States*, the Supreme Court concluded that a similar mistake actually occurred during the passage of IGRA when the Senate took out the words providing for an outright tax exemptions to Indian tribes but kept in a parenthesis, references to Chapter 35 of the Internal Revenue Code which is all about exemptions from taxation. The Court concluded that the Senate had left the language within the parenthesis by mistake and denied the tribes the tax exemption. I think a similar mistake can be inferred here. The Senate took away the words providing for an outright prohibition of gaming but inadvertently left the language referring to the tribal resolution. Following the methodology used by the Supreme Court in *Chickasaw* should lead courts to the conclusion that the Senate just forgot to take out the reference to the tribal resolution. There is one thing, however, that the Supreme Court was not willing to do in *Chickasaw* and that was to pretend that later amendments made to IGRA had no effect on the meaning of the legislation as finally enacted. Mr. Chairman, the same thing should have occurred here, yet the Fifth Circuit decided to ignore the later amendment.

Finally in defense of the staff, it is perhaps not irrelevant that there was a change in the leadership of the 100th Congress with the Democrat regaining control of the Senate. Perhaps the mistake is just the result of different staff being assigned to handle the bill from one Congress to another.

3. The Indian liberal construction rule.

Perhaps the biggest omission in both the district court and the Fifth Circuit opinions is the absence of any reference to the canon of statutory interpretation according to which statutes enacted for the benefit of Indians are to be liberally construed and any ambiguities resolved in their favor. While the Supreme Court has at times refused to extend application of the rule to statutes of general

applications[1] or to statute which may not have been enacted "for the benefit" of Indians,[2] there is no doubt that the Texas legislation is a specific statute concerning Indians and enacted for their benefit. While the liberal construction rule should not be used to distort the plain meaning of otherwise unambiguous words and while other substantive canons of statutory construction may displace the rule,[3] none of these exceptions are present here. This case in fact is exactly the kind of case which calls for the application of the Indian liberal construction rule.[4]

4. Why Congress is right to pay attention to these issues.

Court decisions such as the one made by the Fifth Circuit on this issue should be scrutinized by Congress because they are part of a larger trend, led by the Supreme Court itself, which is to assert what we in academia call judicial supremacy in areas which should be reserved to the legislature. Thus there has been a slew of court decisions, especially in the area of Federalism, which for some reason or another, either struck acts of Congress as being unconstitutional or seemed to disregard the will of Congress. Scholars have been perplexed by such decisions and have proposed various theories. While some scholars have taken the position that the Court as an institution is just more pro state rights than the Congress and that the Court no longer believes that the rights of the states are adequately protected in Congress,[5] others see ideological and political motivation underneath the theoretical veneer

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[1] See Chickasaw Nation v. United States (2001)

[2] See Negonsott v. Samuels, 507 U.S. 99 (1993).

[3] By substantive canons I mean such canons as the Chevron doctrine or the rule asking courts to interpret a statute so as to avoid raising serious questions concerning the constitutionality of the statute.

[4] Another mistake made by the Fifth Circuit was to hold that gaming on the Texas tribes' reservations was controlled by the restoration act and not by IGRA. I think a good argument can be raised that IGRA supplanted the Texas legislation. On this issue, I found the reasoning of the First Circuit in Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994), to be more persuasive than the rather summary analysis given by the Fifth Circuit in the Ysleta Del Sur case. As stated by the first circuit, IGRA is the later Act and while the Fifth Circuit's asserted that the Texas Act is the more specific statute, this is only correct when it comes to determining the political relation ship between the Texas tribes and the federal government. When it comes to gaming, a good argument can be made that both Acts are equally specific and therefore the later in time should govern, especially since it adopts a national policy governing gaming on Indian reservation.

[5] See Mitchell Lustig, *Rhenquist Court Redefines the Commerce Clause,* N.Y.L.J. 1 (Aug. 28, 2000).

of Federalism.[6] Yet other scholars such as Phillip Frickey at Berkeley, a noted expert on the Legislative Process and Federal Indian Law, believe that rather than a love of the states, it is more a mistrust of Congress which leads the Court to appoint itself as the ultimate arbiter of power between the states and the Congress.[7] These scholars believe that this mistrust has made the Court eager to require more procedural safeguards on the Congress.[8] Yet most of these scholars also believe that the Court's decisions are raising Separation of Power concerns and come from a misunderstanding about how Congress really works as well as a misconception about the proper role of the judiciary.[9]

Whatever the real reason, the decision by the Fifth Circuit in the Ysleta case fits such cases. Thus the decision involves an Act of Congress which at the last moment was amended in a manner which in retrospect turned out to be detrimental to state power. Here, you also have the lack of an adequate record explaining why the amendment was adopted. If the thesis proposed by my colleague Phillip Frickey in his recent Yale Law Review article is correct, this is exactly the kind of scenario which have irked federalist courts in the past. Nevertheless, the Amendment was appropriately made and it is not the role of the courts to require more explanation from the Congress just as they would be right to expect, for instance, from an administrative agency.

CONCLUSION

In conclusion, the actual words of the Act with its emphasis on only preventing gaming prohibited by the law of Texas, the fact that the Senate amended what had previously been an unambiguous gaming ban, the similarities between the words used and the reasoning of the *Cabazon* case, and the House's understanding as reflected by Mo Udall's final words, all point to the fact that the District Court and the Court of Appeals were mistaken. However, to the extent that there is an ambiguity due to the mentioning of the tribal resolution endorsing a ban on gaming, the Indian liberal construction rule should have been used to resolve any ambiguities to the benefit of the tribes. As some

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[6] See Eskridge and FereJohn, *The Elactic Commerce Clause: A Political Theory of American Federalism,* 47 Vand. L. Rev. 1355 (1994), Rubin and Feeley, *Federalism: Some Notes on a national Neurosis,* 41 UCLA L. Rev. 903 (1994).

[7] Philip Frickey and Steven Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique,* 111 Yale L. J. 1707 (2002).

[8] See William Buzbee and Robert Schapiro, *Legislative Record Review,* 54 Stan. L. Rev. 87 (2001).

[9] See Frickey, above at note 8. See also Larry Kramer, *Putting the Politics Back into the Political Safeguard of Federalism,* 100 Colum. L. Rev. 215 (2000), and Frank Cross, *Realism About Federalism,* 74 N.Y.U. L. Rev. 1304 (1999).

scholars have remarked, in some of those cases, the Court seems to be "dissing" Congress.[10] I think this is what may be happening here. Thank you.

[10] See Ruth Colker & James Brudney, *Dissing Congress*, 100 Mich. L. Rev. 80 (2001).